

cultural, and public affairs programming. In the Los Angeles Metropolitan area, KCET, the full-service community licensee, produces both national programs for PBS and programs of local interest to the citizens of Southern and Central California, including nightly news and public affairs programs which focus on both the Los Angeles region and California as a whole. KOCE develops and distributes college telecourses for credit, as well as local programming unique to Orange County. The citizens of Miami are served by both WPBT and by WLRN, which serves the Hispanic population of Miami with instructional programming. Philadelphia is graced with both a general audience public television station, WHYY, and an additional station, WYBE, which broadcasts programming of a uniquely local nature, including coverage of local city events, political debates, town meetings, and school board meetings. WYBE also focuses on the city's growing immigrant community through a mix of ethnic language programming, including *Greek Spirit*, *Ukrainian Melody*, *Deutsche Welle*, *Korean News*, *Caribbean News Roundup*, and numerous others. In Washington, D.C., WETA is the general interest station known nationally for its coverage of public affairs, while WHUT focuses on the African-American community and provides telecourses through Howard University. Lastly, while KCTS addresses general audiences in the Seattle-Tacoma area, KBTC broadcasts exclusively to the rural areas of southwest Washington and also provides educational teleconferences for the region.

Congress and the Commission have long recognized that the existence of multiple public television stations in certain markets is not redundant. Rather, the multiplicity enables public television stations to address more effectively the varied interests of their communities through consistent attention to localism and diversity. For example, in the findings contained in the 1992 Cable Act, Congress stressed the government's "substantial interest in making *all* nonduplicative

local public television services available on cable systems,”⁵⁵ while in the report accompanying its version of the legislation, the House pointed to the government’s “compelling . . . interest in increasing the amount of educational, informational and local public interest programming available to the nation’s audiences.”⁵⁶

B. Growing Satellite Capacity Enables Carriers To Provide Access To The Richness Of Local Public Television Offerings

Section 338(c)(2), in instructing that the Commission’s limitation of carriage obligations with respect to multiple local NCE stations “shall [to the extent possible] provide the same degree of carriage by satellite carriers . . . as is provided by cable systems,” is quite clear: to the extent possible, if a local NCE station is carried on cable, it should be carried on satellite if the satellite carrier provides any local signals in that market.⁵⁷

Undoubtedly, some commenters will argue that the capacity constraints on satellite make it impossible for them to be subject to the same requirements as their cable competitors. In considering these arguments and the extent to which it is “possible” to hold DTV and cable to the same carriage standards, the Commission should look ahead to 2002, when satellite capacity and local delivery capabilities will be vastly increased. As the Commission recognized two years ago, satellite capacity has been growing and will continue to increase at a rapid pace.⁵⁸ By 2002, with the advent of spot-beam technology, improved compression technology, and the

⁵⁵ Cable Television Consumer Protection and Competition Act of 1992, Pub.L. 102-385, 106 Stat. 1460 (codified at 47 U.S.C. §521 *et seq.*), Section 2(a)(7).

⁵⁶ 1992 *Cable Act House Report* at 69.

⁵⁷ 47 U.S.C. § 338(c)(2).

⁵⁸ See *DBS Set-Aside Order*, 13 FCC Rcd at 23284 (1998) (“We recognize that advances in digital compression technology will continue to expand the number of programming channels that can be offered to customers in a given amount of spectrum.”).

addition of more transponder space at Ka-band, satellite capacity is expected to be more than ten times what it is today.

If satellite carriers were to use only their existing and currently planned Ku-band fleet to provide local signals -- an implausible assumption -- we could easily expect spot beam technology to permit a 4.5-fold increase in capacity. Currently, both DirecTV (which has 46 DBS frequencies) and EchoStar (which has 50 DBS frequencies) are providing in the neighborhood of 250 national video channels.⁵⁹ Spot beam technology will be used by both EchoStar⁶⁰ and DirecTV⁶¹ by the end of 2001 to expand their video capacity and provide local-to-local service in additional markets. If these carriers were to upgrade just 18 of their available DBS frequencies with Ku-band spot beams for local service, both DirecTV and EchoStar would have 729 channels available for the carriage of local stations without any reduction in the capacity for national channels. According to Association of Local Television Stations estimates, this would allow for carriage of all eligible local stations through the 68th market (Charleston-Huntington).⁶²

Of course Ka-band satellites will soon supplement the Ku-band capacity, providing far greater opportunity for satellite carriers to service local communities with local signals.

EchoStar, for example, has been licensed for Ka-band at the 121° and 83° orbital locations and

⁵⁹ See <www.qtm.net/~trowbridge/DBScomp.htm>.

⁶⁰ See EchoStar Press Release (Feb. 23, 2000) ("EchoStar VII and VIII will be advanced, high-powered direct broadcast satellites. Each will include spot-beam technology that will allow DISH Network to offer local channels in as many as 60 or more markets across the United States.").

⁶¹ See DirecTV Press Release (Dec. 8, 1999) ("DIRECTV-4S, the HS 601HP satellite will be the first spacecraft in the DIRECTV fleet to use highly focused spot beam technology that will enable DIRECTV to expand its local channel offerings in metropolitan markets throughout the country.").

⁶² See Association of Local Television Stations, "Estimated Number of Must Carry Stations Per Market" (2000).

has ordered a hybrid Ka-Ku-band satellite (EchoStar IX) to be delivered in 2002.⁶³ EchoStar's Ka-band satellite will be used for data and video services. Moreover, EchoStar has applied for an additional 1000 MHz of Ka-band capacity (500 MHz up and down) for the purpose of providing service that makes it more competitive with cable in combining conventional video and interactive services.⁶⁴ Local-into-local has long been considered a key to improving DBS competitiveness. Spot beams at Ka-band provide an even greater increase in capacity than they do at Ku-band. If EchoStar were to use just half of its existing 500 MHz of Ka-band capacity, without utilizing any of the Ka-band capacity it might yet be allocated, for local-to-local spot beams, it could carry 900 local stations (based on EchoStar's design of 48 spot beams per satellite).⁶⁵ This, in combination with a portion of the Ku-band capacity or additional Ka-band capacity could well accommodate all existing local stations. DirecTV also has plans for use of Ka-band, as recently announced by the DirecTV Broadband Satellite Service, which will be the next step toward "products and services that will operate on the Spaceway satellite platform" currently licensed at Ka band for the 99 and 101 degree orbital arc locations.⁶⁶

To the extent that EchoStar and DirecTV do not want to expand commitments of their own licensed capacity to local-into-local, they could also contract with Local TV on Satellite (LTVS) to deliver the signals. Beginning in late 2002, LTVS intends to uplink to two satellites

⁶³ See EchoStar Press Release (Feb. 23, 2000).

⁶⁴ See *In re EchoStar Satellite Corporation, Application for Minor Modification of Ka-Band Authorization*, File Nos. 167-SAT-P/L-95; 168-SAT-P/L-95; 54-SAT-AMEND-96 (Feb. 18, 2000).

⁶⁵ See *Application of EchoStar Satellite Corporation For Authorization To Construct, Launch And Operate Two Ka Band Communications Satellites In The Domestic Fixed-Satellite Service* (Sept. 29, 1995).

⁶⁶ Hughes Network Systems Press Release (Apr. 27, 2000), available at http://www.hns.com/news/pressrel/csp_pres/p042700.htm.

approximately 800 local digital broadcast stations and transmit them at the full 19.4 mbps bit-rate to the homes of DBS subscribers.⁶⁷ Use of this capacity, in conjunction with the existing and planned Ku-capacity of EchoStar and DirecTV, should permit carriage of the vast majority of existing local stations, even without using any other Ka-band capacity such as EchoStar IX or Spaceway. In addition, federal loan guarantee programs could be in place that would subsidize carriage of local stations in smaller markets.⁶⁸ These data suggest that an obligation to carry the same NCE signals that cable is obligated to carry today would not be unduly burdensome.

IV. Local NCE Signals Should Be Carried In Their Entirety And Without Degradation

The Commission is directed to issue regulations that require satellite carriers to (a) carry the same portion of the local NCE television signal that is carried on cable, (b) to provide each NCE station that is carried with the bandwidth and technical capacity equivalent to that provided to commercial stations carried on the same system, and (c) to carry each qualified local NCE station without material degradation.⁶⁹

⁶⁷ See LTVS News Release (Apr. 19, 1999); "New Local TV DBS Satellite System Proposed," *Space and Tech* (Apr. 24, 2000).

⁶⁸ Both the House and the Senate have passed legislation providing for federal loan guarantees to promote delivery of local stations over satellite in smaller markets. See Rural Local Broadcast Signal Act, H.R. 3615 (Apr. 13, 2000) and Launching Our Communities' Access to Local Television Act of 2000, S. 2097 (Mar. 30, 2000).

⁶⁹ See 47 U.S.C. §338(g) ("Within 1 year after November 29, 1999, the Commission shall issue regulations implementing this section following a rulemaking proceeding. The regulations prescribed under this section shall include requirements on satellite carriers that are comparable to the requirements on cable operators under sections 534(b)(3) and (4) and 535(g)(1) and (2)."). Sections 535(g)(1) & (2) state that cable companies must carry the entirety of a public television signal and provide a local NCE station with the equivalent bandwidth it provides to commercial stations and shall carry each NCE station without material degradation. See 47 U.S.C. §535(g)(1) & (2).

A. The Content Eligible For Carriage On Satellite Is The Same Content Eligible For Carriage on Cable

Under Section 615(g)(1) of the Communications Act, cable systems “shall retransmit in its entirety the primary video, accompanying audio, and line 21 closed caption transmission of each qualified local noncommercial educational television station whose signal is carried on the cable system, and, to the extent technically feasible, program-related material carried in the vertical blanking interval, or on subcarriers, that may be necessary for receipt of programming by handicapped persons or for educational or language purposes.”⁷⁰

The Commission seeks comment on the applicability of these requirements to satellite carriers, focusing in particular on the definitions of “primary video” and “program-related.”⁷¹ Congress has definitively answered this question on applicability by instructing the Commission to issue regulations in this area that “are comparable to the requirements on cable operators.”⁷² The Commission has not further defined “primary video” for the cable carriage rules, and in the seven years that the rules have been in effect, this lack of definition has not been a problem. At least in the context of analog broadcast signals, there is no reason for the Commission to provide further definition of the primary video concept for the satellite rules.⁷³ The “program-related” concept has given rise to significantly more debate than has the “primary video” concept. However, here too, the Commission has expressly and repeatedly declined to adopt a clear standard of “program-related,” acknowledging that “[c]arriage of information on a station’s VBI

⁷⁰ 47 U.S.C. § 535(g)(1); *see also* 47 C.F.R. § 76.62(f) (1999).

⁷¹ NPRM ¶¶ 31-33.

⁷² 47 U.S.C. § 338(g).

⁷³ The application of analog broadcast signal concepts to digital broadcast transmissions, which permit much more programming flexibility, raises complex issues for both cable and satellite.

is rapidly evolving; thus, we believe no hard and fast definition [of 'program-related'] can now be developed.”⁷⁴ The factors enumerated in *WGN Continental Broadcasting v. United Video, Inc.*, 693 F.2d 622 (7th Cir. 1982), have served to guide the determination of what is “program-related,”⁷⁵ but have never been the final word on the subject. As the Commission notes, “there will be instances where material which does not fit squarely within the [*WGN*] factors . . . will be program-related under the statute.”⁷⁶ This degree of ambiguity in the cable environment has permitted the Commission to respond flexibly to new uses of the VBI that are in the public interest. The ambiguity has not been a problem and requires no “fix” in the satellite environment.

Satellite viewers should receive the same local broadcast content that they might get through cable or over-the-air. There is no technical impediment to the carriage of VBI material over satellite; it is simply a question of capacity, and not much at that. The introduction of program-related or primary video definitions or limitations in the satellite context which are absent in the cable context can only lead to confusion and dispute. In the same vein, carriage of required material should be considered “technically feasible” for satellite carriers, as it is for cable operators, if only “nominal costs, additions or changes of equipment are necessary.”⁷⁷

⁷⁴ *Cable Carriage Report & Order*, 8 FCC Rcd at 2986; see also *Cable Carriage Memorandum Opinion & Order*, 9 FCC Rcd at 6734.

⁷⁵ As the Commission understands the *WGN* test, this is material that is generally “intended to be seen by viewers of the main program, during the same time interval as the main program, and . . . is an integral part of the main program.” *Cable Carriage Memorandum Opinion & Order*, 9 FCC Rcd at 6734.

⁷⁶ *Id.*

⁷⁷ *Cable Carriage Report & Order*, 8 FCC Rcd at 2986.

B. The Material Degradation Standard Should Produce The Same Results In Satellite And Cable

The cable carriage rules provide that the cable operator must carry a local broadcast signal without “material degradation.”⁷⁸ As the NPRM points out, these rules were adopted against a backdrop of cable technical rules that provided a benchmark for how broadcast signals were to be carried through cable and how such degradations as signal ingress and improperly shielded consumer premises equipment should be avoided.⁷⁹ The Commission noted in promulgating the cable carriage non-degradation rules that the purpose was to ensure comparability of treatment as between broadcast and cable origination channels.⁸⁰ In the satellite context, in the absence of the detailed technical rules for satellite retransmission of broadcast signals, the Commission should ensure the same result: that broadcast signals are not materially degraded as compared with non-broadcast signals. In addition, the Commission should ensure that the compression techniques a satellite carrier employs do not degrade a local broadcast signal such that, to the average viewer, the signal appears materially inferior to what the viewer might receive over the air.⁸¹ Rather than set a fixed compression ratio, the Commission should set a fixed standard of quality based on today’s analog broadcast signal quality so that the quality of local broadcast signals delivered over satellite does not decrease in either relative or absolute terms. Cable operators are required to deliver analog broadcast signals that are picked up within the signal’s Grade B, delivered to subscribers within the Grade B, or received by the system by

⁷⁸ 47 U.S.C. § 535(g)(2); 47 C.F.R. § 76.62(b).

⁷⁹ See *Cable Carriage Report & Order* 8 FCC Rcd at 2990.

⁸⁰ See *id.*

⁸¹ Generally, satellite carriers can deliver local broadcast signals at this standard using 3 mbps.

direct video feed, at a TASO Grade 2 quality.⁸² This equates to a signal level to system noise ratio of 43 decibels as measured at the subscriber's terminal. Public Television supports application of this same standard to satellite carriers.

V. Channel Position And Navigation Rules Should Ensure Easy And Nondiscriminatory Access To NCE Signals

SHVIA requires that satellite carriers retransmit local broadcast stations on "contiguous channels and provide access to such stations' signal at a nondiscriminatory price and in a nondiscriminatory manner on any navigational device, on-screen program guide, or menu."⁸³

A. All Local Broadcast Stations Should Be Carried On Contiguous Channels

The meaning of the first part of this requirement – that local signals be provided on contiguous channels – is transparent. And yet the Notice asks whether "broadcast signals carried under retransmission consent must be contiguous with the television stations carried under Section 338"?⁸⁴ The statute does not distinguish between retransmission consent and must carry stations in this respect.⁸⁵ Rather, local broadcast signals are to be grouped together regardless of

⁸² See 47 C.F.R. § 76.605; *In re Cable Television Technical and Operational Requirements, Report and Order*, 7 FCC Rcd 2021 (1992). TASO stands for the Television Allocation Study Organization and describes levels of television picture quality in terms of their subjective acceptability to viewers. The TASO scale ranges from 1, which is excellent, to 6, which is unusable. See *Engineering Aspects of TV Allocations; Report of TASO* (1959).

⁸³ 47 U.S.C. §338(d).

⁸⁴ NPRM ¶ 29.

⁸⁵ The mere fact that the provision is located in Section 338 does not mean that "broadcast signals" refers only to must carry broadcast signals. Section 614 of the Communications Act (the cable must carry rules for commercial stations) similarly contains obligations that apply to all stations, whether carried under Section 325(b) or under the must carry regime. For example, in the *Cable Carriage Report & Order*, the Commission noted that "Section 614(b)(3) [content to be carried] and (b)(4)(a) [nondegradation] each refer to 'local commercial television stations,' and Section 614(b)(9) [notification of channel change] refers to 'a local commercial television station.' Using the same 'plain language' approach [it] used in analyzing Section 614(b)(3)(B), [the Commission found] that these three provisions, in fact, apply to all commercial television stations carried by a cable system, and not just to must carry stations." *Cable Carriage Report & Order*, 8 FCC Rcd at 3004. On reconsideration, the Commission stated that stations (continued...)

their regulatory status because such grouping makes all local signals more easily accessible to viewers. According to the Conference Report, “[t]he obligation to carry local stations on contiguous channels is illustrative of the general requirement to ensure that satellite carriers position local stations in a way that is convenient and practically accessible for consumers.”⁸⁶ If, as may well be the case in most markets, the carrier negotiates under Section 325(b) for the major commercial stations and carries the noncommercial and independent stations under must carry, and satellite carriers were permitted to carry the two groups of stations on non-contiguous channels, satellite carriers might well choose to exile the must carry signals to a channel hinterland far from the other local broadcast signals. Noncommercial stations in particular would be disadvantaged because they do not have retransmission consent rights and would be hard pressed to negotiate for contiguity. Local broadcast signals, if scattered throughout a program offering which otherwise is rationally organized, are not convenient and practically accessible for consumers.

B. Noncommercial Signals Should Be Made Available Without Additional Cost To, Or Effort By, The Subscriber

The meaning of the second part of Section 338(d) – that local signals be made available at a nondiscriminatory price and manner – is subject to considerably more Commission interpretation than is the first part. As to price, the Notice asks whether must carry stations should “cost no more per channel to subscribers than packages of retransmission consent

eligible for must carry but carried pursuant to retransmission consent “are not permitted to negotiate for carriage of less than their entire signal.” *Cable Carriage Memorandum Opinion & Order*, 9 FCC Rcd at 6745.

⁸⁶ Conference Report at H11795.

television station signals or other satellite service packages.”⁸⁷ If nondiscriminatory is understood to mean nondiscrimination as among channels offered by the carrier, then, at a minimum, the per channel charge for delivery of a must carry station should be no more than the charge for the *least-cost* channel on the system, whether that is another local television station, a distant broadcast signal, or a non-broadcast channel. The Communications Act uses the term “nondiscriminatory access” in imposing on incumbent local exchange carriers the duty to provide nondiscriminatory access to network elements to any requesting telecommunications carrier.⁸⁸ The Commission and courts have understood nondiscriminatory in this case to mean that each network element should be made available on the same terms and conditions that the incumbent itself enjoys, that is, on the *most favorable* terms and conditions.⁸⁹ If a carrier were to charge no more per local broadcast channel than for other packages of programming, the carrier could price the local stations among the premium programming packages -- a result that is distinctly at odds with cable regulation, with the purpose of SHVIA, and with the long-held federal policy of easy access to local broadcast service (particularly to public television).

There is another meaning of nondiscriminatory that is implicit in the effort of SHVIA to create regulatory parity between cable and satellite. This is nondiscrimination as between the treatment of must carry signals on satellite and on cable. Cable systems, under the basic tier

⁸⁷ NPRM ¶ 30.

⁸⁸ 47 U.S.C. § 251(c)(3).

⁸⁹ See, e.g., *AT&T v. Bell Atlantic*, 197 F.3d 663 (4th Cir. 1999); see also *In re Petition of MCI for Declaratory Ruling that New Entrants Need Not Obtain Separate License or Right-to-Use Agreements Before Purchasing Unbundled Elements*, FCC 00-139, 2000 FCC LEXIS 2185 (Apr. 17, 2000); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499 (1996), *aff'd in part, rev'd in part sub nom.*, *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999).

rules, are required to carry local signals at no additional cost to subscribers. While SHVIA does not require satellite carriers to have a basic service tier, the Commission has discretion in interpreting Section 338(d) to ensure that must carry local broadcast signals are easily accessible to subscribers.⁹⁰ At least in the case of noncommercial signals, particularly because there is no rate regulation of DBS, there are compelling policy reasons to ensure that DBS subscribers do not have to pay an additional fee (over and above the lowest priced DBS service) to receive their local NCE signals. As discussed above, it is a long-held federal policy that all Americans should have free, unencumbered access to local NCE signals. SHVIA reflects this policy in its adoption of a compulsory license for the PBS national feed until local stations are carried under the must carry provisions. In light of this policy and the cable paradigm, NCE must carry stations should be offered as part of the existing local broadcast signal package without any additional cost to the subscriber.

As opposed to the issue of price, for which there is a cable paradigm, there is no correlate in the cable carriage rules to SHVIA's mandate regarding navigational devices, on-screen program guides, or menus. Rather, the Commission should look to requirements it has imposed on Open Video Systems ("OVS"). In authorizing the establishment of OVS, Congress saw the need to impose a non-discrimination requirement to prevent OVS operators from using navigational guides and menus to control or skew access to video programming.⁹¹ The Communications Act thus requires that an OVS operator (a) not unreasonably discriminate in favor of itself or its affiliates with respect to the provision or presentation of material to help subscribers select programming, (b) ensure that programming providers are able to suitably and

⁹⁰ See 47 U.S.C. § 338(d); Conference Report at H 11795.

uniquely identify their programming services without alteration by the operator, and (c) not omit television broadcast stations or other unaffiliated programming services from any navigational device, guide or menu.⁹² The Commission has added more flesh to these requirements by expressly prohibiting an OVS operator from (a) discriminating in favor of itself or its affiliate on any navigational device, guide, or menu, (b) omitting television broadcast stations or other unaffiliated video programming services from any navigational device, guide or menu, (c) restricting a programming provider's ability to use part of its channel capacity to provide an individualized guide or menu to subscribers, (d) denying access to any programming provider to the navigational device used by the OVS operator or its affiliate, or (e) preventing a programming provider from suitably and uniquely identifying its programming services to subscribers or altering such identification.⁹³

Looking to the OVS rules for guidance, the FCC should adopt rules that:

- a) Ensure that all must carry local broadcast stations, including NCE stations, are represented in a nondiscriminatory fashion on the electronic program guide, menu, and/or navigation device provided by the satellite carrier. Representation in a nondiscriminatory fashion means that the NCE station logo, for example, should be given the same prominence and placement as that of the most favored channel. In addition, the method by which the NCE station is selected, whether by channel number or interaction with a program guide, should be as easy and transparent as the method used to select the most favored channel.
- b) Ensure that a satellite carrier does not block or otherwise interfere with the functionality of any electronic program guide, navigation device, menu, or program or program-related information material provided by must carry local broadcast stations, including NCE stations.
- c) Ensure that a satellite carrier permits must carry local broadcast stations, including NCE stations, to identify their programming services with textual and

⁹¹ See H.R. Rep. No. 104-203, at 97-98 (1995).

⁹² See 47 U.S.C. § 573(b)(1)(E)(i)-(iv).

⁹³ See 47 C.F.R. § 76.1512(a)-(d).

graphical information and that a satellite carrier does not alter such identification or material.

As the Commission has recognized in the Section 629 proceeding on the commercial availability of navigation devices, the navigational platform is critically important to the future of multichannel video programming distribution.⁹⁴ In the proceeding to implement this requirement, the Commission determined that its obligation to “assure the commercial availability” of navigation devices extends to electronic program guide equipment, and the Commission declared its commitment to “encouraging the development of the market for the provision of electronic program guide services.”⁹⁵ Electronic program guides in particular are likely to become a portal through which consumers access video programming, interactive services, and networked home devices and services. In SHVIA, Congress tried to ensure that local broadcast stations are meaningfully represented on this portal by mandating nondiscriminatory access to navigational platforms, guides and menus. Not only must subscribers be able to easily find and navigate the local broadcasters’ program offerings, but the local stations must be able to present the subscribers with unaltered program information and enhanced navigation functions.

VI. The Commission Should Allow Stations To Substitute Digital For Analog Signals During The Transition To DTV

The Commission seeks comment “on whether satellite carriers should be required to carry digital broadcast television signals in addition to analog broadcast signals” during the

⁹⁴ Section 629 requires the Commission to “adopt regulations to assure the commercial availability, to consumers . . . of . . . equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.” 47 U.S.C. § 549(a).

⁹⁵ *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Report and Order*, 13 FCC Rcd 14775, 14820 (1998).

transition from analog to digital broadcast television.⁹⁶ In considering this question, and in implementing the directive to equalize the regulatory burdens on cable and satellite, the Commission should focus on the differences between satellite and cable when it comes to digital television. Most cable customers are analog-only subscribers capable of receiving only an analog broadcast signal over cable. However, for those growing numbers of subscribers that also receive digital signals over cable, Public Television has taken the position that cable should provide the digital broadcast signal as well.⁹⁷ All DBS subscribers, by contrast, are digital subscribers and receive analog broadcast signals in a converted digital format. If a satellite carrier were to provide a digital broadcast signal in place of an analog signal, all DBS subscribers served with that signal would be able to receive it. Moreover, the DBS operator would be spared the process of converting the signal into an MPEG-2 format, since the signal would already be compliant.⁹⁸ It makes little sense to complete this proceeding – which, after all, deals with carriage of soon-to-be obsolete analog signals over a digital transmission technology – without at least opening an inquiry into carriage of local digital signals, in lieu of analog signals, at the broadcast licensee's option. In less than 18 months, the DBS must carry provisions will take effect; it would not be in the public interest to allow them to come into force without having addressed how digital broadcast signals will replace analog signals on the DBS service.

⁹⁶ NPRM ¶ 48.

⁹⁷ See *In re Carriage of the Transmissions of Digital Television Broadcast Signals, Amendments to Part 76 of the Commission's Rules*, CS Docket No. 98-120, *Comments of APTS, PBS, and CPB* (Oct. 13, 1998); see also *Supplemental Memorandum of APTS, PBS, and CPB Supporting Digital Carriage Regulations*, CS Docket No. 98-120 (Feb. 10, 2000).

⁹⁸ There would presumably need to be a conversion from 8-VSB to QPSK.

Almost 200 local stations are already transmitting in digital, including 18 NCE stations. In 2002, all commercial stations are required to be on the air with digital signals and noncommercial stations will follow a year later. The transition from analog to digital broadcasting is thus an immediate issue for broadcasters, not a faraway goal. Even though the Commission is not required in this proceeding to deal with the carriage of digital signals, it is a public policy imperative for the Commission to consider and issue rules on how the transition from analog to digital broadcasting should be reflected in the satellite carriage rules. Public Television thus urges the Commission to immediately issue a Notice of Proposed Rulemaking proposing that local broadcasters be able to substitute a digital for an analog signal for satellite retransmission. Because carriage of digital signals requires modifications to the understanding of non-degradation, primary video, program-related material, and other analog must carry concepts, Public Television also recommends that the Commission immediately seek comment on appropriate adjustments to these concepts in the context of digital carriage.

In considering satellite digital carriage issues, the Commission should be mindful of the differences between the all-digital satellite technology and the hybrid cable technology. The fact that it might not make sense, and that there is no legislative mandate, to impose dual must carry obligations on satellite carriers, should in no way be used by the Commission to avoid taking the steps the law and public policy require in the digital cable must carry proceeding.

VII. The Commission's Jurisdiction To Consider Satellite Carriage Disputes And Provide Appropriate Relief Is Broad

The Commission seeks guidance on the nature and scope of its ability to remedy violations of its proposed DBS carriage rules. Section 338(a)(2) states that the remedies for any

failure to meet carriage obligations shall be available “exclusively” under 17 U.S.C. §501(f).⁹⁹

Section 501(f)(2) of the Copyright Act authorizes a television broadcast station to “file a civil action against any satellite carrier” that has refused to carry the station’s signal, as required under the compulsory license and must carry provisions of Sections 122(a)(2) of the Copyright Act and 338(a) of the Communications Act respectively.¹⁰⁰

Section 338(f)(1) of the Communications Act, on the other hand, provides that a station should go to the Commission with its satellite carriage grievances. This provision states that whenever a local television broadcast station believes that a satellite carrier has failed to meet its obligations under subsections (b) through (e), a station must notify the carrier, in writing, of the alleged failure, and it must identify its reasons for believing that the satellite carrier failed to comply with such obligations.¹⁰¹ Subsections (b) through (e) concern issues of a good quality signal, substantial program duplication, channel positioning, and compensation for carriage. The satellite carrier must respond within 30 days and comply or state the reasons for noncompliance. If a local station disputes these reasons, it “may obtain review of such denial or response by filing a complaint with the Commission.”¹⁰² If the Commission determines the carrier has failed to meet its obligations, the Commission is authorized to order “appropriate remedial action.”¹⁰³

The Commission concludes from these two jurisdictional provisions that it may adjudicate only those complaints having to do with (1) a good quality signal, (2) program

⁹⁹ 47 U.S.C. §338(a)(2).

¹⁰⁰ 17 U.S.C. §501(f)(2) (“A television broadcast station may file a civil action against any satellite carrier that has refused to carry television broadcast signals, as required under section 122(a)(2), to enforce that television broadcast station’s rights under section 338(a) of the Communications Act of 1934.”).

¹⁰¹ See 47 U.S.C. §338(f)(1).

¹⁰² *Id.*

duplication, (3) channel positioning, (4) or compensation for carriage -- what it terms “unique carriage violations,” as distinguished from a simple “failure to carry.”¹⁰⁴ The Commission asks for guidance on how the two remedial sections relate to one another. As the Commission recognizes, and as has been proven in the cable context, carriage disputes will often hinge on an issue of signal quality or signal duplication. It is thus critical that the Commission acknowledge in this proceeding that the sphere of exclusive judicial jurisdiction is extremely narrow and covers disputes dealing only with interpretation of Section 338(a). To the extent that a carrier is refusing to carry a local station because, for example, it claims that the station’s signal quality is not good or that the station is excessively duplicative, a station’s complaint should be heard by the Commission.

Federal courts have exclusive jurisdiction to decide only:

- whether the DBS carrier is providing local broadcast signals to its subscribers in accordance with the compulsory copyright license of Section 122, and
- whether the local broadcast station in question is located within the relevant local market.

This interpretation is borne out by the plain language and purpose of SHVIA. For instance, Section 338 of the Communications Act states:

[E]ach satellite carrier providing, under section 122 of Title 17, secondary transmissions to subscribers located within the local market of a television broadcast station of a primary transmission made by that station shall carry upon request the signals of all television broadcast stations located within that local market, subject to section 325(b).¹⁰⁵

¹⁰³ 47 U.S.C. §338(f)(3).

¹⁰⁴ NPRM ¶ 53.

¹⁰⁵ 47 U.S.C. §338(a)(1).

As the plain language of the statute indicates, the only two relevant considerations under Section 338(a)(1) are whether a DBS carrier is availing itself of the statutory copyright license and whether the complaining broadcast station is located within relevant local market. Importantly, Section 338(a)(1) does not direct to federal court other disputes that may be related to the carriage of local signals on DBS carriers, nor does it grant these courts the jurisdiction to enforce any of the rules required to be promulgated by the Commission and referenced in Sections 338(b), (c), (d), (e), and (g). In short, Congress intended for the federal judiciary to have a very limited and narrow role in adjudicating the basic copyright and local market components of satellite carriage disputes. All other regulations designed to ensure the carriage of local television stations on DBS carriers and promulgated by the Commission are to be enforced by the Commission with appropriate remedies. There is a danger that a carrier could simply refuse carriage of a requesting local station without explanation in order to seek a judicial venue for any ensuing dispute. The Commission should prevent this by requiring any DBS carrier that refuses carriage to notify the local station in writing of the reason for such refusal within 30 days of such refusal. The refused station should also be able to seek from the Commission a declaratory ruling, within 60 days of the carrier's refusal, that the carrier lacks a valid reason to refuse carriage.

As has been demonstrated above, full Commission jurisdiction over all DBS carriage disputes not within the narrow and limited purview of the federal judiciary comports with the plain language and purpose of the statute. It also makes good policy sense. Those stations SHVIA is designed to protect are typically small, independent or non-commercial stations with limited financial means. In the cable context, the pursuit of must carry complaints before the Commission is relatively inexpensive, swift, and efficient and requires a minimum of paperwork.

Compared to this process, litigating in a federal court raises several, sometimes insurmountable, obstacles for local stations with limited financial means. Not only are filing fees high, but in federal court litigants must also contend with the laborious process of discovery, crowded dockets, a lengthy deliberation period, and additional attorneys' fees.

It is likely, and certainly consistent with congressional intent, that satellite and cable carriage rules will be similar. All cable carriage disputes, and issues related to such disputes, are settled in the first instance by the Commission. If the Commission were to decline to enforce certain basic satellite carriage rights, there could emerge a basic and inequitable inconsistency between similar rules as applied to two competing industries. Moreover, the inability of stations to go to the Commission in the satellite context over such issues as non-carriage for alleged signal quality deficiencies would make it harder to bring DBS carriage complaints than it would to bring cable carriage complaints. Cable would probably benefit unfairly from this result, contrary to the manifest purpose of the statute.

The Commission also seeks comment on what "appropriate remedial action" it may take for violations of its proposed rules covering (a) a good signal, (b) program duplication, (c) channel positioning, or (d) compensation for carriage, and whether this includes an order to pay forfeitures for noncompliance.¹⁰⁶ In the above cases, Public Television supports extending all current remedial provisions that apply to cable carriage disputes to the DBS context. Therefore, where a DBS provider refuses to carry a local NCE station based on an allegedly poor quality signal delivered to a receive facility, and where the Commission determines that the DBS provider has not shouldered its burden of proof in this regard, the Commission may order

¹⁰⁶ NPRM ¶ 52.

carriage as well as forfeitures for willful violations of its rules. The same should apply where a DBS provider refuses to carry a public television station based on allegations of program duplication. In addition, where a DBS provider violates its channel positioning obligations by refusing to place public television stations on channels that are contiguous to those of other local network stations, by charging excessively (or, according to the Public Television proposal, anything extra) for NCE stations, or by discriminating against public television stations in navigation or guide display, the Commission should be empowered to order compliance as well as forfeitures. Similarly, if a DBS provider demands payment in exchange for carriage, the Commission should be able to issue a cease and desist order and forfeiture when appropriate. As noted above, this position comports with the purpose of SHVIA, which is to equalize the regulatory treatment of the cable and satellite industries.

The Commission has wrongly concluded that a broadcaster cannot file a complaint against a DBS provider for carrying only a portion of its broadcast signal or for materially degrading that signal.¹⁰⁷ This conclusion is apparently based on the drafting nuance that the prohibition against material degradation in Section 338(g) is not mentioned in the remedial Section 338(f). It would be anomalous indeed for Congress to create rights without remedies or to imply that the Commission could not enforce its regulations in the absence of a legislative command. Although Congress may not have ordered the Commission to create administrative remedies for violations of these rights, the Commission has the power to do so. Under accepted principles of administrative law, the Commission has the power to remedy ills that lie directly

¹⁰⁷ See NPRM ¶ 53.

within its purview.¹⁰⁸ The Communications Act states that the FCC has the “exclusive jurisdiction to regulate the provision of direct-to-home satellite services,”¹⁰⁹ thereby placing DBS carriage issues directly within the Commission’s purview (except to the very limited degree to which jurisdiction is vested with the federal courts). The Commission also has a more generalized regulatory power, expressed by the Communications Act as the power to “make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act.”¹¹⁰ Lastly, the Commission has the authority to levy forfeitures for willful or repeated failure to comply substantially with either the Act or the Commission’s own regulations.¹¹¹ Failure to remedy DBS infractions of certain of the

¹⁰⁸ See *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 312 (1963) (“[W]here the problem lies within the purview of the [Civil Aeronautics] Board, ... Congress must have intended to give it authority that was ample to deal with the evil at hand. . . [and therefore the power to order divestiture] need not be explicitly included in the powers of an administrative agency to be part of its arsenal of authority.”); see also *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 756 (D.C. Cir. 1977) (holding that the FTC had implied power to order Listerine to issue corrected advertising that its product does not prevent colds); *American Genealogies, Inc. v. United States Postal Serv.*, 717 F. Supp. 895, 898-99 (1989) (holding that the Postal Service had implied power to issue a mandatory injunction requiring the retention of records to deter postal fraud). The Commission has adopted this line of cases in exercising its remedial authority. See, e.g., *In re Application of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985, 20001 n.57 (citing *Pan American Airways* for the proposition that “the power to order divestiture need not be explicitly included in the powers of an administrative agency to be part of its arsenal of authority”).

¹⁰⁹ 47 U.S.C. §303(v).

¹¹⁰ 47 U.S.C. §303(r).

¹¹¹ “Any person who is determined by the Commission ... to have –

(A) willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission;

(B) willfully or repeatedly failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission under this Act ...

...shall be liable to the United States for a forfeiture penalty.” 47 U.S.C. §503(b)(1). The forfeiture may be determined against a person after an administrative hearing conducted by the FCC. See 47 U.S.C. § 503(b)(3)(A); see also 47 C.F.R. § 1.80.

signal carriage rules would effectively result in an exemption for the satellite industry where none exists for cable. This too would contradict the purpose of SHVIA, which was to equalize the regulatory treatment of cable and satellite.

* * *

In consideration of the foregoing, Public Television urges the Commission to make the rights of local NCE signals to carriage on satellite meaningful, easily effectuated, and complete. Beginning in 2002, the public should have access to the same local public television stations, with the same content and at least the same quality signal, over satellite that they can receive over cable.

Respectfully Submitted,

Marilyn Mohrman-Gillis
Vice President, Policy and Legal Affairs
Lonna M. Thompson
Director, Legal Affairs
Andrew D. Cotlar
Staff Attorney
Association of America's Public
Television Stations
1350 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036
202-887-1700

Kathleen Cox
Senior Vice President Policy, General
Counsel and Corporate Secretary
Robert M. Winteringham
Staff Attorney
Corporation for Public Broadcasting
401 9th Street, N.W.
Washington, D.C. 20004
202-879-9600

Gregory Ferenbach
Senior Vice President and General Counsel
Public Broadcasting Service
1320 Braddock Place
Alexandria, Virginia 22314
703-739-5000

July 14, 2000

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Implementation of the Satellite Home)	
Viewer Improvement Act of 1999:)	CS Docket No. 00-96
)	
Broadcast Signal Carriage Issues)	
)	

To: The Commission

**JOINT REPLY COMMENTS OF THE
ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS
THE PUBLIC BROADCASTING SERVICE
AND
THE CORPORATION FOR PUBLIC BROADCASTING**

Marilyn Mohrman-Gillis
Vice President, Policy and Legal Affairs
Lonna M. Thompson
Director, Legal Affairs
Andrew D. Cotlar
Staff Attorney
Association of America's Public
Television Stations
1350 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036

Kathleen Cox
Senior Vice President Policy, General
Counsel and Corporate Secretary
Robert M. Winteringham
Staff Attorney
Corporation for Public Broadcasting
401 9th Street, N.W.
Washington, D.C. 20004

Gregory Ferenbach
Senior Vice President and General Counsel
Public Broadcasting Service
1320 Braddock Place
Alexandria, Virginia 22314

August 4, 2000

TABLE OF CONTENTS

I.	THE SATELLITE CARRIERS PROPOSE FORMULAS FOR NCE STATION CARRIAGE THAT HAVE NO LEGAL FOUNDATION, ARE CONTRARY TO THE PLAIN LANGUAGE AND INTENT OF SHVIA, AND BEAR NO RELATIONSHIP TO DBS CAPACITY IN 2002	2
A.	The Various Formulas Proposed By The Satellite Carriers Would Not Result In The Carriage Of Local Stations	4
B.	The DBS Commenters Depict A Burden On Capacity That Would Not Exist Today And Certainly Will Not Exist in 2002.....	5
C.	The DBS Must Carry Rules Are Designed To Ensure Access To Local Broadcast Signals, While The DBS Set-Aside Rules Have An Entirely Different Purpose	9
D.	EchoStar's Suggestion That The Must Carry Rules Are Unconstitutional Should Be Rejected	13
II.	THE COMMISSION SHOULD NOT ADOPT THE DBS COMMENTERS' SUGGESTIONS THAT WOULD UNDULY BURDEN THE RIGHTS OF LOCAL STATIONS TO HAVE THEIR SIGNALS CARRIED.....	15
A.	The Good Quality Signal Requirement Should Not Be Used To Avoid Carriage.....	15
B.	The Location Of Receive Sites Should Not Be Used To Hinder Delivery Of A Good Quality Signal	18
III.	THE COMMISSION SHOULD ASSUME THAT IT IS TECHNICALLY FEASIBLE FOR CARRIERS TO RETRANSMIT VBI CONTENT, AND THE BURDEN SHOULD BE ON CARRIERS TO SHOW THAT IT IS NOT	21
IV.	THE COMMISSION SHOULD REJECT THE CUMBERSOME REMEDIAL PROPOSAL WHEREBY A STATION MIGHT FREQUENTLY HAVE TO LITIGATE IN TWO FORA	23